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No. 91-24

In the Supreme Court of the United States

OCTOBER TERM, 1991

BANK OF COUSHATTA, ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a capital directive issued by the Federal Deposit Insurance Corporation pursuant to 12 U.S.C. 3907 is subject to judicial review under the Administrative Procedure Act in district court enforcement proceedings.

2. Whether the procedures for issuance and enforcement of a capital directive are constitutional.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 930 F.2d 1122. The district court's order (Pet. App. 21a-22a) and its memorandum ruling denying petitioners' motion for a stay pending appeal (Pet. App. 23a-29a) are unreported. The capital directive issued by the Federal Deposit Insurance Corporation (Pet. App. 30a-33a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1991. The petition for a writ of certiorari was filed on July 1, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are the Bank of Coushatta, a bank chartered by the State of Louisiana and federally insured pursuant to the Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.*, and its directors (collectively the Bank). On July 28, 1989, the Federal Deposit Insurance Corporation (FDIC) sent a letter to petitioners transmitting the FDIC's most recent report of examination of the Bank's financial condition. The letter noted that the Bank was operating with capital below the minimum required regulatory level. The letter further noted that the Bank's deteriorating financial status suggested that the Bank was incapable of meeting the commitment it had previously made to regulators to increase its capital. Pet. App. 2a.

Accompanying the letter was the FDIC's proposal to issue a capital directive—specifically, a Notice of Intent to Issue Directive to the Bank to increase its capital pursuant to Section 3907(b)(2) of the International Lending Supervision Act of 1983 (ILSA), 12 U.S.C. 3907(b)(2), and 12 C.F.R. 325.6.[1] The

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[1] Capital directives are authorized by ILSA, which requires federal banking agencies to "cause banking institutions to achieve and maintain adequate capital by establishing minimum levels of capital for such banking institutions and by using such other methods as the appropriate Federal banking agency deems appropriate." 12 U.S.C. 3907(a)(1). The ILSA further permits a federal banking agency, "in its discretion," to consider the failure of a bank to maintain capital at or above the minimum level "to constitute an unsafe and unsound practice within the meaning of [12 U.S.C. 1818]." 12 U.S.C. 3907(b)(1). In addition to that remedy, a banking agency "may issue" a capital directive—"a directive to a banking institution that fails to maintain capital at or above its required level as established pursuant to subsection (a) of this

Notice contained preliminary findings of fact and conclusions of law stating that the ratio of the Bank's primary and total capital to assets, as defined by applicable regulations, was below minimum regulatory requirements. The Notice proposed a capital directive requiring that, by December 1989, the Bank increase its ratio of primary capital to total assets and its ratio of total capital to assets to that required for a healthy bank, and also requiring an increase in capital of not less than $725,000. Pet. App. 2a.

Under 12 C.F.R. 325.6(c), the Bank had the right to respond to the proposed capital directive, "explaining why the directive should not be issued, seeking modification of its terms, or other appropriate relief." In August 1989, the Bank responded to the Notice with a brief letter. The Bank did not dispute any aspect of the FDIC's calculation of the Bank's capital position, instead admitting that it was not in compliance with regulatory capital requirements. Pet. App. 3a, 24a, 28a. The letter explained that the Bank's tenuous financial position was the result of loan losses, other real estate losses, and the weakness of the Louisiana economy. The letter offered no concrete proposal for meeting the minimum capital requirements. *Id.* at 3a.

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section." 12 U.S.C. 3907(b)(2)(A). The "directive may require the banking institution to submit and adhere to a plan acceptable to the * * * agency describing the means and timing by which the banking institution shall achieve its required capital level." 12 U.S.C. 3907(b)(2)(B). 12 C.F.R. 325.6 sets forth the FDIC's procedures for the issuance of a capital directive. In keeping with the nature of a capital directive as one of the less intrusive enforcement mechanisms, Pet. App. 18a-19a, ILSA does not specify formal administrative proceedings for the issuance of a capital directive, nor does it provide for judicial review of such a directive. 12 U.S.C. 3907. See Pet. App. 4a-7a, 16a-17a.

In September 1989, after considering petitioners' response, the FDIC issued the capital directive. Pet. App. 30a-33a. The directive was binding on both the Bank of Coushatta and its directors. Pet. App. 33a; see 12 U.S.C. 3909(d); 12 C.F.R. 325.6(d)(1). It required the Bank to meet the minimum ratio of primary capital to total assets and to increase its capital by $725,000. Petitioners were given thirty days in which to submit a plan for meeting the required capital level. Pet. App. 33a.

2. Petitioners failed to comply with the capital directive. In May 1990, the FDIC applied to the United States District Court for the Western District of Louisiana for an order enforcing the capital directive pursuant to 12 U.S.C. 1818(i).[2] On July 13, 1990, the district court issued the requested order ex parte, enjoining petitioners to comply with the capital directive and requiring them to file a report within thirty days after entry of the order detailing their compliance with the order. Pet. App. 3a-4a, 22a.

Petitioners appealed and requested a stay pending appeal. The district court denied the stay request, explaining that petitioners had failed to establish a likelihood of success on appeal. Pet. App. 23a-29a.

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[2] Pursuant to 12 U.S.C. 3907(b)(2)(ii), a capital directive "issued pursuant to this paragraph, including plans submitted pursuant thereto, shall be enforceable under the provisions of [12 U.S.C. 1818(i)] to the same extent as an effective and outstanding [cease and desist] order issued pursuant to [12 U.S.C. 1818(b)] which has become final." Section 1818(i)(1) authorizes the FDIC to apply to the district court for enforcement of "any effective and outstanding notice or order" and states that the district court has jurisdiction to require compliance with those orders, but that, "except as otherwise provided in this section no court shall have jurisdiction * * * to review, modify, suspend, terminate, or set aside any such notice or order." 12 U.S.C. 1818(i)(1).

The court rejected petitioners' contention that the issuance of the court's order ex parte violated the judicial review provisions of the Administrative Procedure Act (APA). The court found that "the determination of whether or not to issue a capital directive is committed to the sole discretion of the FDIC and is, therefore, unreviewable under the [APA]." Pet. App. 26a, citing 5 U.S.C. 701(a)(2). The court also rejected petitioners' claim that the issuance of the capital directive without a hearing violated the Due Process Clause of the Fifth Amendment. Pet. App. 27a-28a. Finally, the court dismissed the contentions that the ex parte order was the result of misrepresentations by the FDIC about the nature of the district court's role in enforcing a capital directive, and that the FDIC's procedures violated the APA.[3] *Id.* at 26a.

3. The court of appeals affirmed. The court agreed with the district court that judicial review of the capital directive was not available because the issuance of a capital directive is "committed to agency discretion by law" under 5 U.S.C. 701(a)(2). Pet. App. 11a, 14a. The court noted that Section 701(a)(2) precludes APA review of agency actions under statutes "drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion." Pet. App. 10a, quoting *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985). The court also noted that in *Webster* v. *Doe*, 486 U.S. 592 (1988), this Court had found the absence of meaningful standards for review where the statute permitted the Director of the Central Intelligence Agency (CIA) to terminate an employee whenever

[3] The court of appeals also denied petitioners' request for a stay. Pet. App. 4a.

the Director "shall *deem* such termination necessary or advisable in the interests of the United States." 50 U.S.C. 403(c) (emphasis added). The court found in ILSA a parallel to the language in *Webster*; ILSA's repeated use of the terms "deem" and "discretion," in defining the FDIC's power to regulate minimum capital requirements, leaves the courts without meaningful reviewing criteria. The court also found support for that result in the legislative history of ILSA. Pet. App. 12a-14a.

Next, the court rejected petitioners' claim that the FDIC's procedures for issuing a capital directive violate the Due Process Clause of the Fifth Amendment.[4] The court first described the FDIC's procedures. Under the FDIC's regulations, the agency is required to notify the bank of the agency's intent to issue a capital directive and to provide the underlying data from which the bank's capital was calculated. The regulations further provide the bank with an opportunity to file a written response, with supporting data, to explain why the directive should not issue or should be modified. Finally, the FDIC is required to consider the bank's response and to make findings of fact and conclusions of law. Pet. App. 16a.

The Bank did not argue that the FDIC had failed to observe these procedures, but complained that the procedures do not afford an adequate chance to challenge the facts supporting the determination of a capital deficiency. The court dismissed that contention, noting that the regulations give a bank the right to

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[4] Although it had found that judicial review of the agency's determination to issue a capital directive was precluded, the court determined that Congress had not manifested an intention to preclude review of constitutional claims. Pet. App. 14a.

submit any relevant evidence bearing on the underlying facts. Pet. App. 17a; 12 C.F.R. 325.6(c). Petitioners "did not take full advantage of [the Bank's] opportunity to respond," nor did petitioners "challenge any of the data provided [the Bank], including the report of examination." Pet. App. 17a. "Needless to say, [the Bank's] failure to take such opportunity is not due to an inherent deficiency in the procedures." *Ibid.*

Turning to the issue whether due process required an evidentiary hearing, the court applied the three-factor analysis of *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). The court found that although the private interest affected is "substantial," the risk of an erroneous deprivation of that interest under the FDIC's procedures is "minimal" because "[t]he decision to issue [a directive] comes only after several deliberative steps and thorough documentation, including a bank examination, presentation of the examination report to a bank and consideration of any written response." Pet. App. 18a. The court also found that the government interest in prompt implementation of the capital directive is significant because of the harm that delay could cause to the Bank's financial condition. *Ibid.* Weighing those interests, the court concluded that petitioners' due process rights are adequately protected by the existing procedures. *Id.* at 19a.

ARGUMENT

The court of appeals correctly decided the two issues before it—whether a capital directive issued by the FDIC is subject to judicial review and whether the FDIC's procedures for issuance of such a directive violate due process. No other court of appeals has addressed either issue, and the court's decision does not conflict with any decision of this Court. Moreover, petitioners' procedural challenges are entirely academic because petitioners have never questioned the substantive underpinnings of the FDIC's decision to issue the capital directive, *i.e.*, the agency's determination that petitioners failed to meet the minimum regulatory capital requirements. Accordingly, this Court's review is not warranted.

1. Petitioners contend (Pet. 8-12) that the court of appeals erred in holding that the issuance of the capital directive is "agency action committed to agency discretion by law," and therefore unreviewable under 5 U.S.C. 701(a)(2). The court of appeals, however, correctly concluded that the statute provides no meaningful standards against which to review the complex and technical financial determinaitons that the FDIC makes under ILSA; accordingly, the APA does not afford a right to judicial review.

a. ILSA repeatedly uses terms of judgment reflecting Congress's intent to give the banking agencies broad discretion. Minimum capital levels are to be established as the agency, "in its discretion, deems to be necessary or appropriate in light of the particular circumstances of the banking institution"; the banking agency "may * * * deem[]" noncompliance to be an unsafe or unsound practice, "in its discretion"; and the agency "may issue" a capital directive "[i]n addition to, or in lieu of, any other action au-

thorized by law." 12 U.S.C. 3907(a)(2), (b)(1), and (b)(2)(A). Neither the statute nor the implementing regulations provide any standards that courts could apply in considering whether the agency acted within the boundaries of its discretion in issuing a capital directive. As in *Webster* v. *Doe*, the statute "fairly exudes deference * * * and appears * * * to foreclose application of any meaningful standard of judicial review." 486 U.S. at 600.[5]

The legislative history confirms that conclusion. As the court of appeals noted, Pet. App. 6a-7a, a specific purpose behind Congress's enactment of ILSA was to overrule *First Nat'l Bank of Bellaire* v. *Comptroller of the Currency*, 697 F.2d 674, 685-687 (5th Cir. 1983), which had set aside, as unsupported by substantial evidence, a banking agency's requirement of a capital ratio in a cease and desist order. The Senate Report criticized *Bellaire* because it had "clouded the authority of the bank regulatory agencies to exercise their *independent discretion* in establishing and requiring the maintenance of appropriate levels of capital." S. Rep. No. 122, 98th Cong., 1st Sess. 16 (1983) (emphasis added). In seeking to forestall such judicial intervention, the Senate Banking Committee explained that

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[5] The discretionary nature of a capital directive is also evident from the overall statutory scheme. A capital directive generally would follow a painstaking examination of the bank's books and discussions with bank officials. The purpose of the directive is to have the bank shore up its capital position in order to keep it from experiencing more serious financial troubles. If more serious troubles develop, however, there are far more serious remedies—such as the appointment of a conservator or receiver for the bank. In those settings, judicial review of the agency's action is available. See *Franklin Sav. Bank* v. *Director, Office of Thrift Supervision*, 934 F.2d 1127, 1141-1142 (10th Cir. 1991).

> establishing adequate levels of capital is properly left to the expertise and discretion of the agencies. Therefore, in order to clarify the authority of the banking agencies to establish adequate levels of capital requirements, to require the maintenance of those levels, and *to prevent the courts from disturbing such capital*, the Committee has provided a specific grant of authority to the banking agencies to establish levels of capital.

Ibid. (emphasis added). Against that background, it is clear that the issuance of a capital directive, which results from technical banking determinations implicating industry expertise as well as economic judgment, is not subject to judicial review.[6]

b. Petitioners contend (Pet. 8-12) that Section 701(a)(2) cannot preclude review because a capital directive is enforced by the courts at the behest of an executive agency. No decision of this Court, however, holds that the nonreviewability of an agency determination turns on whether a private party or the government has invoked the jurisdiction of the courts. If that were true, the reviewability of agency

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[6] Petitioners err in relying (Pet. 11) on a statement by Banking Committee Chairman St. Germain that "[t]he committee believes that the authority of an agency to require a bank to maintain adequate capital is properly within the expertise and discretion of the agency, subject to the appropriate standard of judicial review." 129 Cong. Rec. 22,652 (1983). Even if read as implying that courts may review capital directives—something the statement does not say—the statement cannot take precedence over the clear statutory language and structure of ILSA. See *Wisconsin Public Intervenor* v. *Mortier*, 111 S. Ct. 2476, 2484 n.4 (1991). Moreover, the floor statement is entitled to considerably less weight than the authoritative explanation in the committee report. See, *e.g.*, *Garcia* v. *United States*, 469 U.S. 70, 76 (1984).

action would depend on fortuities of litigation, rather than the nature of the pertinent statutory provisions. For example, in *Webster* v. *Doe*, *supra*, the Court found that a CIA employee could not obtain judicial review of his termination. Under petitioners' approach, however, if the CIA had sued Doe to require him to surrender his agency credentials on the ground that he had been terminated, Section 701(a)(2) would not have applied and Doe would have been entitled to full-scale judicial review on the merits of his termination. By the same reasoning, if a bank filed a complaint seeking APA review of the FDIC's issuance of a capital directive, petitioners would not object to the FDIC's reliance on Section 701(a)(2). Nothing in the APA remotely suggests that the reviewability of a particular agency determination hinges on which party is the plaintiff. Section 701(a)(2) speaks in terms of "statutes" that preclude review, not "actions" in which review is precluded.[7]

Petitioners also briefly contend (Pet. 7-8, 15) that the court of appeals misconstrued both 5 U.S.C. 701(a)(1), which provides that review under the APA is unavailable where "statutes preclude judicial review," and the jurisdictional limitations of 12 U.S.C. 1818(i). No question respecting either provision is presented in this case; the court of appeals did not rely on either in holding that review is precluded. The court of appeals considered the applicability of

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[7] Petitioners' reliance (Pet. 9-10) on *Heckler* v. *Chaney*, *supra*, is misplaced. In that case, the Court established a presumption that an agency decision *not* to bring an enforcement action is nonreviewable. 470 U.S. at 832. The Court did not consider what standards govern decisions to initiate a proceeding, nor did it address the reviewability of an administrative determination that is enforced through the courts.

Section 701(a)(1), but held that "even if review is not prohibited pursuant to § 701(a)(1), it is precluded pursuant to § 701(a)(2), because issuance of a directive is committed to the FDIC's discretion." Pet. App. 14a. As to Section 1818(i), the court did no more than note that "no review is allowed in the district court enforcement proceeding" because the court's "jurisdiction is limited to the 'power to order and require compliance.'" Pet. App. 10a, quoting Section 1818(i). While that statement is supportive of the position we urge—that review is not available of a capital directive—the court's opinion makes clear that it rested its decision, not on Section 1818(i), but on Section 701(a)(2) of the APA.[8]

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[8] Although construction of Section 1818(i) was not necessary to a rejection of petitioners' claims, we note that petitioners are wrong in suggesting (Pet. 8) that our brief in *Board of Governors of the Federal Reserve System* v. *MCorp Financial, Inc.*, No. 90-913, concedes that Section 1818(i) is not a jurisdictional bar. As we explained in our reply brief in *MCorp* (at 2 n.1), Section 1818(i) *is* a jurisdictional limitation, which, as applied to cease and desist orders, effectively calls for the exhaustion of administrative remedies. As applied to capital directives by ILSA, however, Section 1818(i) functions as a complete jurisdictional bar to judicial review. Petitioners also assert (Pet. 15-16) that the court of appeals' decision essentially renders the *MCorp* case "moot" because banking agencies can accomplish the same purpose, *i.e.*, requiring an increase in the bank's capital, without providing the same procedures that apply when the Federal Reserve Board requires a bank holding company to supply capital to a subsidiary bank. The short and complete answer is that capital directives may issue only against "banking institutions," 12 U.S.C. 3907(a), not bank holding companies. Therefore, a capital directive cannot impose requirements on a bank holding company such as were imposed in *MCorp*. More importantly, petitioner overlooks that a capital directive is a comparatively mild requirement compared to the more stringent

2. Citing *Thomas* v. *Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985), petitioners claim (Pet. 12-13) that the procedures employed in this case violate Article III and the Due Process Clause because the courts below enforced a capital directive without having reviewed it. Contrary to petitioners' contention (Pet. 12-13), the nonreviewability of a capital directive is not unconstitutional. As this Court recognized in *Thomas*, "[m]any matters that involve the application of legal standards to facts and affect private interests are routinely decided by agency action with limited or no review by Article III courts." 473 U.S. at 583. See, *e.g.*, *United States* v. *Fausto*, 484 U.S. 439 (1988) (no review of the amount of backpay due an employee of the federal government); *NLRB* v. *United Food & Commercial Workers*, 484 U.S. 112 (1987) (no review of General Counsel's settlement of an unfair labor practice complaint); *Wayte* v. *United States*, 470 U.S. 598, 607 (1985) (decision whether or not to prosecute rests within the discretion of the prosecutor and "is particularly ill-suited to judicial review"); *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982) (no review of the amount of payment due under Part B of the Medicare program); *Switchmen's Union* v. *National Mediation Bd.*, 320 U.S. 297 (1943) (no review of National Mediation Board decisions). Under those cases, there is no irreducible constitutional requirement that Article III courts review all determinations in a federal regulatory program.

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remedies in the banking regulators' arsenal, see 12 U.S.C. 1818. Indeed, capital directives are relatively rarely used. The paucity of litigation regarding capital directives, as well as the absence of any other circuit court decisions on the issue, undercuts petitioners' submission (Pet. 16-17) that the issue in this case are of widespread importance.

The Article III and due process claims in this case are particularly weak because judicial review was available for petitioners' constitutional claims. Cf. *Webster* v. *Doe*, 486 U.S. at 603. As the opinion of the court of appeals illustrates, a bank that receives a capital directive may raise due process or other constitutional claims in the context of an enforcement proceeding. Pet. App. 14a. It may also be that a bank could argue that a particular capital directive was wholly beyond the statutory authority of the agency to issue, cf. *Heckler* v. *Chaney*, 470 U.S. at 832; *Thomas*, 473 U.S. at 591-592, although petitioners never raised such a claim in this case. See Pet. 17 n.9. It is plain, in any event, that the Constitution does not require review of the factual or enforcement determinations that prompted the FDIC to issue the capital directive in this case.[9]

Petitioners also contend (Pet. 13-14) that the district court's enforcement of the capital directive violated either the Federal Rules of Civil Procedure or the Due Process Clause because of the failure of the court to give notice of the proceedings prior to entering its order. "The Federal Rules of Civil Pro-

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[9] Petitioners are not aided by *United States* v. *Mendoza-Lopez*, 481 U.S. 828 (1987). As the passage quoted by petitioners indicates (Pet. 12), that case found a requirement of judicial review only where a criminal sanction was imposed as a result of an administrative determination, which is not the case here. Nor can petitioner derive support (Pet. 13) from *Atlas Roofing Co.* v. *OSHRC*, 430 U.S. 442, 455 n.13 (1977), or *Touby* v. *United States*, 111 S. Ct. 1752 (1991). *Atlas Roofing* decided a Seventh Amendment issue and did not determine the requirements of Article III or of due process. *Touby* considered whether pre-enforcement judicial review of a particular agency action was required to survive a nondelegation challenge. No nondelegation challenge is presented here.

cedure were designed for ordinary, plenary civil actions. They do not apply to a summary proceeding that is not a 'suit of a civil nature' within the meaning of Rule 1." 4 C. Wright & A. Miller, *Federal Practice and Procedure* § 1026, at 102 (2d ed. 1987). Ex parte applications may be permitted in summary proceedings. *Id.* at 103. Because this case arose under 12 U.S.C. 1818(i)(1), which authorizes the FDIC to "apply * * * for the enforcement of any effective and outstanding order" and bars review of the merits, the district court properly treated it as a summary proceeding.[10] But whether or not this is so, petitioners suffered no prejudice as a result of proceedings in the district court, and thus are in no position to complain about them. See Fed. R. Civ. P. 61 (court must "disregard any error or defect in the proceedings which does not affect the substantial rights of the parties").

Petitioners had the opportunity to ask the district court to reconsider its order before compliance was required, and in fact they made all of their arguments to the district court about why an order should not issue in requesting a stay.[11] Pet. App. 23a-29a.

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[10] Under ILSA and 12 U.S.C. 1818(i), the district court, when enforcing a capital directive, is required to treat the capital directive as a final and unreviewable order; therefore, the only issue before the court is whether there has been compliance with the order. The district court's procedure here suited those requirements: the court issued an order enforcing the capital directive, subject to a showing by petitioners, in thirty days, that they had complied. Pet. App. 22a.

[11] In contrast to the situation in *Armstrong* v. *Manzo*, 380 U.S. 545 (1965), see Pet. 13, the district court's ex parte order enforcing the capital directive did not enhance the burden on petitioners to establish a defense; it merely functioned as a "show cause" order that afforded petitioners the only right

They also had the benefit of raising and litigating all of their claims on appeal, subject to a de novo standard of review. And petitioners have never contested the FDIC's determination that there was a factual and legal predicate for issuing a capital directive against the Bank. *Id.* at 28a. In light of those factors, it is difficult to imagine what benefit petitioners would have derived from the procedures they claim to desire. The mode by which the district court proceeded had no adverse impact no petitioners' substantial rights.[12]

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to which they were entitled: the opportunity to demonstrate compliance.

[12] The petition presents two other questions that do not warrant review. The first question presented in the petition, Pet. (i), is whether, under the Constitution, ILSA, or the APA, a capital directive can be imposed without the opportunity for a hearing. The petition does not discuss that issue; accordingly, petitioners have shown no reason for this Court to review it. In any event, the court of appeals explained why the procedures afforded in this case satisfy the Due Process Clause, Pet. App. 14a-19a, see also *Califano* v. *Yamasaki*, 442 U.S. 682, 696 (1979), and petitioners, having failed to request additional agency procedures, are barred from raising such a due process claim in this case. See *FDIC* v. *Mallen*, 486 U.S. 230, 247-248 (1988). Nor do ILSA or the APA require more formal procedures; ILSA is silent on the issue, and the issuance of a capital directive is not an "adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. 554(a). The fourth question presented, Pet. (i), is whether a bank's directors can be ordered to comply with a capital directive issued to the bank. Again, the petition does not discuss that issue, but the court of appeals correctly resolved it. The directive was sent to the Bank's board, Pet. App. 2a n.2, which has the responsibility for directing the affairs of the Bank. *Id.* at 8a n.5. As the court of appeals noted, "[t]he Board was clearly on notice of the directive," *ibid.*, and its directors were properly held responsible for enforcing it.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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